

PANKAJ KHANDELWAL V. SHANKAR KHANDELWAL

Pankaj Khandelwal,
S/o Shri Goverdhan Bhavwar Khandelwal,
Aged about 48 years,
R/o of B-2002, Gokul Concorde,
Thakur Village, Kandivali (E), Mumbai
Also At :-
233, Sonthalio Ka Rasta,
Kishan Pole Bazaar, 302001.
Nominal Partner Of A. Gangwal Real Estate L.L.P.
Having Its Office At The Crest,
Suite No. 9, Plot No. 4A,
Airport Enclave Scheme,
Tonk Road, Jaipur, Rajasthan – 302018.

...Appellant

Versus

1. A. Gangwal Real Estate L.L.P,
Through IRP Mr. Prashant Sharma
Having his Office At V.P. Sharma & Associates,
611, Arcade, 6th Floor, K-12,
Malviya Marg, C- Scheme, Jaipur – 302001.

...Respondent No. 1

2. Shankar Khandelwal
Through Tikam Khandelwal,
R/o Plot No. 171,
Officer Campus Extension,
Near Sanskar School,
Sirsi Road, Jaipur 302012

...Respondent No. 2

Case No: COMPANY APPEAL (AT) (Insolvency) No. 879 of 2021

Date of Judgement: 07.12.2023

Judges:

[Justice Anant Bijay Singh]

Member (Judicial)

[Mr. Naresh Salecha]

Member (Technical)

For Appellant: Ms. Archana Pathak Dave, Ms. Ankita Chaudhary, Mr. Shrayas Balaji & Mr. Vaibhav Dwivedi, Advocates.

For Respondents: Mr. Prabhash Sharma, for R-1/ IRP.Mr. K. Dutta, Sr. Advocate along with Mr. Ankit Sareen, Mr. Yash Tandon & Mr. Gaurav, for R-2.

WITH

Rajasthan State Industrial Development and Investment Corporation Limited,
Having its registered office at Udyog Bhawan,
Tilak Marg, C- Scheme,
Jaipur, Rajasthan through its authorised representative.

...Appellant

Versus

1. Shri Shankar Khandelwal
Through Shri Tikam Khandelwal
171, Officers Campus Extension
Near Sanskar School, Sirsi Road
Jaipur, Rajasthan – 302012 ..Respondent No. 1
2. A. Gangwal Real Estate LLP
The Crest Suite No. 9
Plot No. A-4

Airport Enclave Scheme
Tonk Road,
Jaipur, Rajasthan – 302018

...Respondent No. 2

Case No: COMPANY APPEAL (AT) (Insolvency) No. 270 of 2022

For Appellant: Mr. Anuj Bhandari & Mr. Rajat Gupta, for RIICO.

For Respondents: Mr. K. Dutta, Sr. Advocate along with Mr. Prakuł

Khuran, Mr. Gourav Asati & Mr. Yash Tandon,
for R1. Mr. Prabhash Sharma, for R-2/ IRP.

Facts

The case involves appeals filed by Mr. Pankaj Khandelwal and Rajasthan State Industrial Development and Investment Corporation Limited (RIICO) against a common order dated 13.10.2021 passed by NCLT Jaipur admitting an application under Section 7 of IBC filed by Mr. Shankar Khandelwal against M/s A. Gangwal Real Estate LLP (Corporate Debtor) for initiation of Corporate Insolvency Resolution Process (CIRP). The Corporate Debtor is a Limited Liability Partnership (LLP) formed in 2014. Over time, there have been changes in its designated partners and nominal partners. In September 2014, Mr. Shankar Khandelwal and his wife Mrs. Guman Khandelwal were admitted as designated partners. The Corporate Debtor obtained a loan from RIICO which as per the appellant, was transferred to accounts of Mr. Shankar Khandelwal's family concerns. When this was discovered, Mr. Shankar Khandelwal agreed to settle his outstanding loans with the Corporate Debtor and also retire from the LLP. Mr. Shankar Khandelwal was arrested in Syndicate Bank scam as one of the main accused and remained in custody for over two years. As per LLP Agreement dated 31.12.2015 incorporating retirement of Mr. Shankar Khandelwal, all his outstanding dues were squared off against outstanding debts. Appellant alleged that Mr. Shankar Khandelwal filed false FIRs for extortion and blackmail against other partners.

As per balance sheet dated 31.03.2016, the amount due to Mr. Shankar Khandelwal was Rs. 5.16 crores which was fully repaid. In total, Rs. 30 crores was paid to Mr. Shankar Khandelwal's wife's company M/s Guman Builders and Developers Pvt Ltd.

Elaborate Opinions of the Court

Lack of express loan agreement does not bar treatment of a transaction as financial debt under IBC, if disbursement of loan and payment of interest is acknowledged or proved through statements of account/balance sheets. The court did not accept Mr. Shankar Khandelwal's contention that LLP Agreement dated 31.12.2015 recording his retirement was fabricated and signed under duress in his absence. As per LLP Agreement dated 31.12.2015, the balance sheet of the Corporate Debtor had to be drawn prior to Mr. Shankar Khandelwal's retirement in order to determine the amount payable to him. Hence, the balance sheet dated 31.03.2016 becomes the basis for determining his outstanding dues. Based on the balance sheet dated 31.03.2016, the outstanding debt to Mr. Shankar Khandelwal was only Rs. 5.16 crores. His other inflated claims cannot be accepted. Clause 5(vi) of the LLP Agreement specifically instructed that outstanding balances with M/s Guman Builders and Developers Pvt Ltd (Mr. Shankar Khandelwal's wife's company) be adjusted against the amount payable to him. Hence, the payment of Rs. 30 crores to that company has to be treated as valid discharge of debt. Ledger accounts provide detailed records of transactions which form the basis for preparation of balance sheets. Hence, in cases of dispute regarding settlement of debt, examination of both balance sheet and ledger accounts is warranted. As per combined examination of balance sheet and ledger accounts, the entire debt of Rs. 5.16 crores to Mr. Shankar Khandelwal stands fully settled – firstly Rs. 1.04 crores was repaid in tranches upto 16.08.2016 and the remaining Rs. 4.13 crores was repaid on 28.10.2016 vide 2 demand drafts. Once the debt has been fully settled, disputed claims can only be agitated in other legal forums. Initiation

of CIRP under IBC is not for facilitating recovery of debts. Impugned order failed to properly examine the impact of Clause 5(vi) of LLP Agreement regarding specific instructions on payment to third party for debt settlement. Hence Impugned order is not valid. No financial debt was due to Mr. Shankar Khandelwal on the date of filing Section 7 application. Hence admission of the application is erroneous.

Arguments by Appellant Pankaj Khandelwal

Mr. Shankar Khandelwal does not qualify as a financial creditor under Section 5(8) of IBC. Hence Section 7 application against Corporate Debtor was not maintainable. The debt amount claimed is highly inflated and false, only Rs. 5.16 crores was payable to Mr. Shankar Khandelwal as per balance sheet dated 31.03.2016 which amount was fully repaid. Adjudicating Authority failed to examine real nature of transaction as per dicta in case of Phoenix ARC Pvt Ltd v Spade Financial Services Ltd. Mr. Shankar Khandelwal is trying to recover alleged tainted money parked in Corporate Debtor's accounts. CIRP cannot be invoked only for debt recovery.

Arguments by Appellant RIICO

RIICO has first charge over the mortgaged property secured against loan advanced to Corporate Debtor. The property was attached by Enforcement Directorate due to links of Mr. Shankar Khandelwal with money laundering case. Balance sheet dated 31.03.2016 shows the debt payable to Mr. Shankar Khandelwal was only Rs. 5.16 crores which amount was fully settled. Transaction in question does not qualify as financial debt under IBC. Corporate veil needs to be lifted to assess real nature of transaction. As debt has been settled, disputed claims can only be agitated in civil courts and not through IBC.

Arguments by Respondent Shankar Khandelwal

Appellant Pankaj Khandelwal lacks standing being only a

nominal partner. Only designated partners represent LLP. LLP Agreement dated 31.12.2015 is fabricated document, signed by him under duress. Balance sheet wrongly records his outstanding as only Rs. 5.16 crores whereas around Rs. 40 crores was payable to him. Payment to third party does not amount to discharge of debt owed to him. Proceedings under PMLA for money laundering charges do not bar him from initiating CIRP against Corporate Debtor.

Sections

Section 5(8), Section 7, Section 14 and Section 61 of Insolvency and Bankruptcy Code, 2016

Cases Cited

Phoenix ARC Pvt Ltd v Spade Financial Services Ltd & Ors, Civil Appeal No. 2842 of 2020

Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17

Laws Referred

Limited Liability Partnership Act, 2008; Prevention of Money Laundering Act, 2002

Download

Court

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Full Text of Judgment:

1. There are two Appeals i.e., Company Appeal (AT) (Insolvency) No. 879 of 2021 and Company Appeal (AT) (Insolvency) No. 270 of 2022 filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the common Impugned Order dated 13.10.2021 passed by the National Company Law Tribunal, Jaipur Bench (in short 'Adjudicating Authority'), whereby the Adjudicating Authority admitted the Application filed by the Respondent No. 2 in Company Appeal

(AT) (Insolvency) No. 879 of 2021 and Respondent No. 1 in Company Appeal (AT) (Insolvency) No. 270 of 2022 i.e., Shankar Khandelwal as Financial Creditor under Section 7 of the Code. Mr. Pankaj Khandelwal is the Appellant in Company Appeal (AT) (Ins.) No. 879 of 2021 and Rajasthan State Industrial Development and Investment Corporation Limited (for short 'RIICO') is the Appellant in Company Appeal (AT) (Insolvency) No. 270 of 2022.

2. The Corporate Insolvency Resolution Process (in short 'CIRP') was initiated against A. Gangwal Real Estate L.L.P who is the Corporate Debtor and the Respondent herein. A moratorium was declared under Section 14 of the Code.

3. Since both appeals have been preferred before us against the same common Impugned Order dated 13.10.2021 and are based on same or similar facts and were also heard conjointly, as such we will examine both these appeals together in coming discussions and will decide by single order.

4. Heard the Counsel for the Parties, perused the records made available including cited judgements.

5. The Corporate Debtor, "A. Gangwal Real Estate L.L.P", a Limited Liability Partnership (in short "LLP"), was incorporated on August 5, 2014 under the provisions of the Limited Liability Partnership Act, 2008. It has further been informed that the Corporate Debtor as LLP has undergone various changes since its incorporation, in respect of admission and retirement of designated partners and nominal partners.

6. The Corporate Debtor was formed initially with Mr. Ajay Gangwal and his wife Mrs. Rakhi Gangwal as designated partners, having a 50:50 profit sharing ratio, with capital contribution of Rs. 50,000/- each. Thereafter, Mr. Ajay Gangwal and Mrs. Rakhi Gangwal retired from A. Gangwal Real Estate LLP and vide a supplementary agreement dated September 25, 2014, Mr. Shankar Lal Khandelwal, the Respondent No. 2 Company Appeal (AT) (Insolvency) No. 879 of 2021 and Respondent No. 1 in Company Appeal (AT) (Insolvency) No. 270

of 2022 and his wife Mrs. Guman Khandelwal were admitted as designated partners along with the Corporate Debtor. It has been brought out that at present the designated partners of the Corporate Debtor are Narendra Singh Lakshman Singh Rathod and Charan Singh Khangrot besides Mr. Pankaj Khandelwal and Mudit Danagyach at its nominal partners.

7. It has been alleged by the Appellant that during the tenure of Shankar Khandelwal being a Partner of the LLP, the Corporate Debtor obtained a Loan from RIICO which after being credited to the Bank Account of the Corporate Debtor, the said amount was transferred immediately to the accounts of concerns which were either family owned companies of Shankar Khandelwal or his family members. It is the case of the Appellant that when such fraud was tracked, Shankar Khandelwal allegedly admitted such transfer upon personal fund requirements and also agreed to adjust the same with his outstanding loans with the Corporate Debtor along with his retirement from the LLP/ Corporate Debtor.

8. It is the case of the Appellant that Shankar Khandelwal was arrested in SYNDICATE BANK SCAM as one of the main accused and was taken into custody where he remained for more than two years.

9. It has been submitted that the LLP Agreement dated 31.12.2015 is the Agreement which incorporates the retirement of the Respondent Shankar Khandelwal from the Corporate Debtor w.e.f. 01.04.2016. It is the case of the Appellant that the entire outstanding duty along with unsecured loans belonging to Shankar Khandelwal, his wife Guman Khandelwal and their concerns were squared off against outstanding debts and adjustment paying off balance outstanding in terms of LLP Agreement dated 31.12.2015.

10. The Appellant castigated the conduct of the Respondent Shankar Khandelwal who filed false FIR to deceive other partners of the Corporate Debtor for the purpose of extortion and blackmail and the said FIR was closed by the Police putting a FR being false FIR.

11. The Appellant submitted that the liabilities of both, the

incoming and outgoing partners' were crystallized and determined by way of preparing audited balance sheets, duly signed by the Statutory Auditors of the Firm and all these well duly registered with the office of the Registrar of Companies.

12. The Appellant denied the averments of the Respondent – Shankar Khandelwal regarding dishonours of 6 alleged cheques out of which 3 cheques were issued by Mr. Mudit Danagyach. 2 cheques were issued by Nihal Danagyach and one cheque was issued by Vinay Tambi. The Appellant stated that the alleged dishonour of cheques have no link to the alleged claims by the Shankar Khandelwal, as the said alleged cheques were issued by the drawers in their personal capacity and not in capacity of the

partners of the Corporate Debtor.

13. The Appellant emphasised that the Adjudicating Authority whilst passing the Impugned Order ignored the decision of the Hon'ble Supreme Court of India in the case of Phoenix Arc Pvt Ltd v Spade Financial Services Ltd & Ors, Civil Appeal No. 2842 of 2020, wherein the Hon'ble Supreme Court held that whilst admitting Section 7 application, it is the duty of the Adjudicating Authority to investigate the real nature of transaction. The Appellant assailed the Impugned Order which failed to consider that Shankar Khandelwal is neither a financial creditor, nor falls within the purview of Section 5(8) of the Code, and therefore, Section 7 application was not maintainable against the Corporate Debtor as all amounts owed by the Corporate Debtor to Shankar Khandelwal have been repaid.

14. The Appellant assailed the conduct of the Shankar Khandelwal who falsely claimed outstanding financial debt of Rs. 38,73,94,501/- including Rs. 18,84,74,920/- as the principal and Rs.19,89,19,581/- as interest, only for purpose of extortion from the Appellant and the Corporate Debtor.

15. It is the case of the Appellant that as per its balance sheet of the Corporate Debtor for the Financial Year 2015-16, the balance due and payable to the Shankar Khandelwal was

Rs.5,16,55,842/-, which was repaid by the Corporate Debtor, with the last remaining sum of Rs. 4,12,97,252/-, being paid vide two demand drafts dated 28.10.2016 amounting to Rs. 4,12,72,252 & Rs. 25,000/- respectively in accordance with LLP agreement dated 31.12.2015. The Appellant highlighted that the Corporate Debtor paid Rs. 30 Crores to M/s Guman Builders and Developers Private Limited wherein the Shankar Khandelwal and his wife are the shareholders and as such there was no debt due and payable which was not disputed by Shankar Khandelwal or his wife Guman Khandelwal

16. Per contra, the Respondents denied all averments of the Appellant and stated that the Appellant is the only nominal partner of the Corporate Debtor of the LLP Company and as per rules only Designated Partners of the Corporate Debtor can act on behalf of the LLP, hence Appeal deserves to be dismissed for the want of locus of the Appellant.

17. It is the case of the Respondent Shankar Khandelwal that the LLP agreement dated 31.12.2015 is forged & fabricated document. The Respondent Shankar Khandelwal claimed that in the year 2016, a false case was planted against him because of which he was arrested and during his time in jail, other partners of the Corporate Debtor pressurised him (Shankar Khandelwal) and his wife to sign few documents on the false promise to pay back him his entire dues by the Corporate Debtor and

accordingly the Respondent Shankar Khandelwal signed these documents which were later used for printing the LLP agreement dated 31.12.2015, the terms and clauses of which were never agreed by and between the then partners. The Respondent Shankar Khandelwal submitted that the LLP document dated 31.12.2015 relied upon by the Appellant is disputed and an FIR to this effect had already been filed. The Respondent Shankar Khandelwal claimed that he was forcefully and deceitfully made to retire

from the firm and the then partners of the Corporate Debtor had given the 6 post-dated cheques (PDCs) totalling to Rs. 6,07,00,000/- which were deposited in the month of April 2017,

however, all the cheques got dishonoured and no payment could be received by the Respondent- Shankar Khandelwal.

18. The Respondent Shankar Khandelwal emphasised that the Bank statements of the Corporate Debtor cannot be valid proof for the discharge of its debt owed to the him as the same has not been paid but to third independent entities like M/s Guman Builders and Developers Private Limited which in no manner can be regarded as a valid discharge of debt.

19. The Respondent Shankar Khandelwal submitted that the balance sheet of the Corporate Debtor showed that around Rs. 40 Crores was due as on 31.03.2015 and payable to the Respondent Shankar Khandelwal which was falsely reduced to Rs. 5,16,55,842/- against which only an amount of Rs. 4,12,97,252/- has been alleged to have been, thereby leaving a deficit payment of Rs. 1,03,58,590/- which still remains due and payable to him.

20. The Appellant RIICO gave the background of the property under challenge and clarified that the property situated as A-5, Airport Enclave, Airport Plaza Extension, Tonk Road, Jaipur, admeasuring 7276.40 sq. mtrs. ("Mortgaged Property") was purchased by the Corporate Debtor M/s A. Gangwal Real Estate LLP (Respondent No. 2) in Company Appeal (AT) No. 270 of 2022 in an open auction from Jaipur development Authority (JDA) held on 23.09.2014 for construction of a Residential Complex. The Corporate Debtor approached the Appellant RIICO for a term loan of Rs. 40 Crores to repay the unsecured loans raised for making payment to JDA towards the cost of land and the Appellant approved the same vide its Letter of Intent No. ID.D.1 (2205) dated 09.11.2015. It is the case of the Appellant RIICO that the plot situated at A-5, Airport Enclave, Airport Plaza Extension, Tonk Road, Jaipur was kept as primary security with the Appellant RIICO against the loan amount and the Appellant RIICO has the first and sole charge over the aforesaid property.

21. The Appellant RIICO stated that the Respondent Shankar Khandelwal resigned from the Corporate Debtor and the LLP

agreement dated 31.12.2015 clearly records that no amount is due from LLP to him. It is the case of the Respondent No. 2 i.e., the Corporate Debtor that as per its balance sheet of the Financial Year 2015-16, the balance due and payable to the Respondent No. 1 Shankar Khandelwal was only Rs.5,16,55,842/- and the same was repaid and thereby there is no debt due and payable as on date by the corporate debtor to the Respondent No. 1.

22. The Appellant RIICO gave the background of CBI case against the the Respondent Shankar Khandelwal who is allegedly to be one of the masterminds in money laundering of approximately Rs. 1055.79 Crores from Syndicate Bank and based on various FIR's registered by the CBI, ECIR No. JPZ0/01/2016 was registered on 11.07.2016 by the Enforcement Directorate ("ED"). The Appellant RIICO stated that the Respondent Shankar Khandelwal was arrested in connection with the said Fraud on 18.03.2016 and in pursuance to the said ECIR, Provisional Attachment order was issued on 10.05.2018 by the Deputy Director, Enforcement Directorate, Jaipur wherein the aforesaid Mortgaged Property of the Corporate Debtor M/s. A. Gangwal Real Estate LLP was attached under the provision of Prevention of Money Laundering Act (in short 'PMLA').

23. It has been submitted that when the said attachment came to the Appellant RIICO's knowledge, the Appellant challenged the same before PMLA Appellate Authority and vide order dated 17.06.2019, PMLA Appellate Authority, after observing that Corporate Debtor is beneficiary of proceeds of crime, held that rights of RIICO being Financial Institution would prevail over attachment of ED. The Appellate Authority therefore vacated the attachment over Mortgaged Property permitting RIICO to realize and liquidate the same and allowed rest of the attachment. The Appellant RIICO took possession of the Mortgaged Property on 18.09.2019 and the Appellant. RIICO thereafter issued 4 advertisements dated 20.12.2019, 24.02.2020, July 2020 and 02.11.2020 for auction of Mortgage Property. In the 4th advertisement for auction, Appellant

RIICO received bids from one Argas Homes LLP for Rs. 59.39 Crores. The Appellant RIICO took steps to realize its security interest to settle the debt owed to it. However, Writ Petition No. 710 of 2021 was filed by the auction purchaser and D.B. Misc. Appeal No. 5318/2019 was filed by Enforcement Directorate and the Hon'ble High Court of Jaipur directed parties to maintain status quo over the Mortgaged Property vide its order dated 17.12.2020. The said Petitions are presently pending before Hon'ble High Court of Jaipur.

24. The Appellant submitted that the Respondent Shanker Khandelwal had transferred substantial money in account of Corporate Debtor while under his control only to park his proceeds of crime and there was no written contract or requirement of money nor any terms of debt were settled between the parties and the transaction therefore cannot be termed as financial debt. The Appellant requested to this Appellate Tribunal to pierce the veil and appreciate the real nature of transaction and see if the same was of the nature of "Financial Debt" as defined in Code. The Appellant cited judgement of this Appellate Tribunal in Sach Marketing Pvt. Ltd. v. Resolution Professional of Mount Shivalik Industries Ltd., Ms. Pratibha Khandelwal, CA (AT) (Ins) No. 180 of 2021, where it was held that:

"15. The Hon'ble Supreme Court in 'Ram Janki Devi and Ors.' Vs. 'Juggilal Kamlapat', AIR 1971 SC 2551 in para 12 has observed as follows:-

"12. The case of a deposit is something more than a mere loan of money. It will depend on the facts of each case whether the transaction is clothed with the character of a deposit of money. The surrounding circumstances, the relationship and character of the transaction and the manner in which parties treated the transaction will throw light on the true form of the transactions."

16. The Hon'ble Supreme Court in 'V.E.A Annamalai Chettiar and Anr.' Vs. 'S. V.V.S. Veerappa Chettiar & Ors.', AIR 1956 SC 12

has observed that 'the answer to the question whether it was a loan or deposit would not depend merely on the terms of the document but has to be judged from the intention of the parties and the circumstances of the case. That is manifestly the correct approach'."

(Emphasis Supplied)

The Appellant submitted that as per the above, it can be clearly noted that the true intent behind a transaction being a loan/debt or not has to be determined on the basis of the surrounding circumstances of the case as well as the intention of the parties.

25. The Appellant also cited the judgment of the Hon'ble Supreme Court in Phoenix ARC Private Limited v. Spade Financial Services Limited & Ors., [(2021) 3 SCC 475], wherein it was held as follows:

"48. The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent. A transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt. A useful elaboration of "sham transactions" can be found in the opinion of Diplock, L.J. in Snook v. London & West Riding Investments Ltd. [Snook v. London & West Riding Investments Ltd., (1967) 2 QB 786: (1967) 2 WLR 1020 (CA)]: (QB p. 802)

"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if

any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

49. Diplock, L.J. also stated: (Snook case [Snook v. London & West Riding Investments Ltd., (1967) 2 QB 786: (1967) 2 WLR 1020 (CA)], QB p. 802)

"But one thing, I think, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v. Maclure [Yorkshire Railway Wagon Co. v. Maclure, (1882) LR 21 Ch D 309 (CA)] and Stoneleigh Finance Ltd. v. Phillips [Stoneleigh Finance Ltd. v. Phillips, (1965) 2 QB 537: (1965) 2 WLR 508 (CA)]), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."

(Emphasis Supplied)"

It is therefore the case of the Appellant that those transactions which are collusive in nature, or are a sham in nature, i.e., where the illusion is created that a "loan" is satisfying the elements of financial debt, these transactions can not be seen as legally valid financial debts under the Code.

26. The Appellant alleged that the Respondent Shankar Khandelwal is attempting to recover tainted money from the Corporate Debtor, which is forming a part of the proceeds of crime. Even if the alleged loan is found to not be a part of the proceeds of crime, any attempts towards recovery of the

amount would have to be adjudicated by a civil court under a recovery suit.

The intent of IBC is not to facilitate recovery for creditors.

27. The Appellant stated that the date when debt became due is unknown and the Respondent Shankar Khandelwal has taken the debt becoming due from the date of filing of an FIR against Corporate Debtor i.e. 17.04.2017 which is not admissible particularly in absence of any written contract.

28. The Appellant stated that as there was no agreement between the parties, there is no agreed interest rate which is to be charged on the transferred amount, or if the transfer was interest free advance. As there was no interest component decided between the parties, it can be safely assumed that there was no "time value of money" attached with the transaction. Therefore, the transfer cannot be considered as "Financial Debt"

29. It is the case of the Appellant that the Financial Creditor has for the first time in the Application under Section 7 before the Adjudicating Authority claimed 18% interest on the amount, which is without any basis and Respondent No. 1 has failed to establish any understanding between the parties regarding rate of interest.

30. The Appellant stated that Shri Pankaj Khandelwal, one of the Partners in the Corporate Debtor A. Gangwal Real Estate LLP challenged the impugned order dated 13.10.2021 before this Appellate Tribunal in CA (AT) (Ins.) No. 879/2021 and this Appellate Tribunal vide order dated 28.10.2021 granted stay on the constitution of Committee of Creditors in Company Appeal (AT) No. 879 of 2021, which is still in operation.

31. It is the case of the Appellant that the Appellant/ RIICO is the sole secured creditor of M/s. A. Gangwal Real Estate LLP, the Appellant filed an IA for impleadment in the pending application of the Respondent Shankar Khandelwal before the Adjudicating Authority but the Adjudicating Authority dismissed the impleadment application IA No. 52/JPR/2020 as non-maintainable.

32. The Appellant submitted that the IRP published the public announcement inviting claims against the Corporate Debtor and the IRP wrote letter to the Appellant – RIICO seeking possession of the mortgaged property. Appellant RIICO vide its letter dated 26.10.2021 informed the IRP regarding orders of status quo passed by the Hon'ble High Court of Jaipur and submitted that in light of the said orders possession cannot be granted to the IRP. The Appellant further filed its claim before the IRP without

prejudice to its rights to file an appeal against the Impugned Order and accordingly aggrieved by the impugned order dated 13.10.2021, the Appellant RIICO has filed the present Appeal.

33. The Appellant submitted that the Appellant RIICO is government Financial Institute and has nothing to do with crime committed by the borrowers and the mortgage properties legally belong to the Appellant RIICO as financial security for loan agreement to the Corporate Debtor. The Appellant submitted that the said property has been attached only to the extent of Rs. 7.37 Crores whereas the valuation of the property was Rs. 79.16 Crores in year 2014. It is the case of Appellant that the Appellant without prejudice to its submissions, undertook to pay a sum of Rs. 7.37 Crores to the Directorate of Enforcement out of the surplus of the sale proceeds of the said property which is duly recorded in the order dated 17.06.2019. As a result of this attachment, the Appellant has been unable to liquidate the same and satisfy its dues. The Appellant reiterated being Government Company and attachment of these properties would deprive the Appellant from recovering the due amount, which in turn would be a loss of public money.

34. Per contra, the Respondent Shankar Khandelwal stated that there is no place for any third party other than the concerned financial creditor and the Corporate Debtor under Section 7 of the Code. The Respondent No. 1 cited the judgment of Vekas Kumar Garg vs. DMI Finance Pvt. Ltd., CA(AT)(Ins) No. 113 of 2021, wherein this Appellate Tribunal has categorically held that in an application under Section 7, the Financial Creditor

and the Corporate Debtor alone are the necessary party at the pre-admission stage. It is the case of the Respondent Shankar Khandelwal that if the application filed by any financial creditor against the corporate debtor has already been admitted, no further application by any other financial is maintainable and the only remedy available to other financial creditors is to submit their claims to the IRP/RP appointed by the Adjudicating Authority

in an admitted application in respect of the said corporate debtor. The Respondent Shankar Khandelwal, therefore, pleaded that the Appellant- RIICO does not have locus to file the instant appeal initiating CIRP against the Corporate Debtor as it is not a person aggrieved in terms of Section 61 of the Code, although, the Appellant-RIICO, being a Secured Financial Creditor

would have priority over distribution of proceeds under the CIRP.

35. It is further submitted by the Respondent Shankar Khandelwal that subsequent to the initiation of CIRP, RIICO has already participated in the process by filing a claim before the RP which came to be admitted pursuant to which RIICO became a Secured Financial Creditor. Hence, RIICO having already participated in the process cannot be allowed to challenge such process.

36. The Respondent Shankar Khandelwal alleged that he was eligible to receive outstanding dues of Rs. 33,80,22,172/- from the Corporate Debtor. The Respondent No. 1 assailed the conduct of the Corporate Debtor for taking stand that earlier payments were made to Guman Builders & Developers Pvt. Ltd. and further balance sheet of the Corporate Debtor for financial year 2015-16 showed only Rs. 5,16,55,842/- as outstanding dues of the Respondent Shankar Khandelwal, which the Appellant claimed to have repaid.

37. The Respondent No. 1 pleaded that the mortgaged land lawfully belongs to the Corporate Debtor and CIRP has been initiated, the asset is to be handed over to the RP and the

Appellant RIICO in order to defeat the CIRP has filed this frivolous appeal while simultaneously filing a claim before the RP and submitting itself to the CIRP.

38. The Respondent Shankar Khandelwal submitted that the FIR and Chargesheet filed by the Enforcement Directorate are pending for adjudication before the competent court of law and it is trite of law that investigation is not a conclusive proof of guilt until and unless adjudicated by a competent court of law. Even otherwise, such proceedings do not create legal bar upon the Respondent Shankar Khandelwal to initiate CIRP of the Corporate Debtor/ LLP. The Respondent Shankar Khandelwal further

submitted that the investigation concerning proceeds of crime falls under the ambit of Prevent of Money Laundering Act, 2002 while the present appeal challenges the admission order passed by the Adjudicating Authority on an application filed under Section 7 of the Code and hence, the same cannot be clubbed. The Respondent Shankar Khandelwal, concluded his arguments with request to dismiss both these appeals.

39. As regards contentions of the Appellant that there was no written agreement so there is no Financial Debt, we note that the Code nowhere prescribes the compulsory existence of an express agreement to prove the loan and its disbursement to be treated as a 'financial debt. Where there are acknowledgements by corporate debtor and where the statement of accounts produced proves the disbursement of a loan and payment of interest, the lack of an express loan agreement would not bar financial creditor from initiating CIRP. In the present appeals, we have seen Balance Sheet prepared clearly acknowledged debts dues towards the Respondent Shankar Khandelwal, hence we do not agree on this point with the Appellant.

40. We have noted the contentions of the Respondent Shankar Khandelwal about alleged fabricated LLP dated 31.12.2015, which according to the Respondent Shankar Khandelwal, were got signed by him under duress and against which some FIR has been filed. The contention of the Appellant was also noted denying

all these averments of the Respondent Shankar Khandelwal and giving contrary facts. Shorn of unnecessary details, this Appellate Tribunal consider LLP Agreement dated 31.12.2015 as the basis for settlement which is duly signed by all concerned including the Respondent Shankar Khandelwal and all formalities were completed, therefore, we do not agree to the contention of the Respondent Shankar Khandelwal on this point.

41. We have noted that the Respondent Shankar Khandelwal has referred to this Appellate Tribunal earlier decision in Vekas Kumar Garg vs. DMI Finance Pvt. Ltd., CA(AT)(Ins) No. 113 of 2021. The relevant portion reads as under :-

“3. After hearing learned counsel for the Appellant and going through the record, we are of the view that the ground projected by the Appellant in his capacity as Resolution Professional of NDL for seeking impleadment in CP IB- 2115 / ND / 2019 pending consideration before the Adjudicating Authority does not warrant impleadment of Appellant as party Respondent. In an application under Section 7, the Financial Creditor and the Corporate Debtor alone are the necessary party and the Adjudicating Authority is, at the pre-admission stage only required to satisfy itself that there is a financial debt in respect whereof the Corporate Debtor has committed a default warranting triggering of CIRP The Adjudicating Authority is required to satisfy itself in regard to there being a financial debt and default thereof on the part of the Corporate Debtor besides the application being complete as mandated under Section 7(5) of the I&B Code’ and then pass an order of admission or rejection on merit as mandated under sub-section (4) of Section 7 within 14 days. No third party intervention is contemplated at that stage.”

(Emphasis Supplied)

Thus, we tend to agree at the pre stage for admission or other wise of any application filed under Section 7 of the Code, it is only the Financial Creditor or Corporate Debtor who are essential party. However, any person aggrieved by same can

make an appeal under Section 61 of the Code, and both the Appellants have filed the present appeals aggrieved by the Impugned Order. The Section 61 of the Code reads as under :-

“61. Appeals and Appellate Authority. –

(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal. ***

(Emphasis Supplied)

42. Since both the parties have relied heavily on LLP Agreement dated 31.12.2015, it will be desirable for us to refer and take a note of the same. The said LLP Agreement dated 31.12.2015 reads as under :-

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43. From the above LLP Agreement dated 31.12.2015 following salient points emerges :-

(i) The terms of the Resignation of Mr. Shankar Khandelwal was mentioned in Clause 5.

(ii) The Outgoing Partner Shankar Khandelwal retirement was w.e.f 01.04.2016.

(iii) The Outgoing Partner Shankar Khandelwal did not continue for any right over share, right, title, interest or claim, of any nature whatsoever, to or in the said LLP or business or assets of its name or its properties, whether tangible or intangible, including the outstanding etc. whatsoever.

(iv) The parties agreed to prepare the Balance sheet of the Corporate Debtor prior to the retirement of the outgoing partner Shankar Khandelwal, reflecting all assets and liabilities of the Corporate Debtor to determine the amounts payable to the Outgoing Partner Shankar Khandelwal.

(v) In determining the amount payable to outgoing partner Shankar Khandelwal, the balances if any, with the name of Guman Builders & Developers Pvt. Ltd.& Guman Furniture & Services Pvt. Ltd. or any of his Sister Concern were to be adjusted to the account of Outgoing Partner

(vi) The sixth Party i.e., Respondent Shankar Khandelwal released all its rights and claims to and in the said LLP and its assets of all kinds.

44. From the above LLP Agreement dated 31.12.2015, it becomes clear that the Respondent Shankar Khandelwal resigned on 31.12.2015 to be effective from 01.04.2016 and the balance sheet of Corporate Debtor LLP was necessary to be drawn accordingly to settle his dues. It is also noteworthy that all outstanding of Guman Builders and Developers Pvt. Ltd and Guman Furniture & Services Pvt. Ltd., was agreed to be adjusted to the account of outstanding partner i.e., the Respondent Shankar Khandelwal.

45. We note that as per clause 5 (vi) of the LLP agreement dated 31.12.2015, vide which Shankar Khandelwal retired, mentioned that the parties to the agreement were supposed to

prepare a balance sheet prior to the retirement of the Shankar Khandelwal, with a view to determine the amounts payable to him. Thus, the Balance Sheet becomes the basis for determining and settling outstanding dues of the Respondent Shankar Khandelwal in the manner specified herein in clause 5 (vi) which apparently has been done here.

46. Here we will like to refer to the Balance Sheet as on 31.03.2016 prepared in accordance with the LLP Agreement dated 31.12.2015. The Balance Sheet reads as under :-



47. The important point to be noted from the above Balance Sheet duly signed by partners of the Corporate Debtor including wife of Respondent Shankar Khandelwal Guman Khandelwal and Statutory Auditors is regarding "Non current liabilities" which has been elaborated vide Note 3 to the Balance Sheet dated 31.03.2016. As per this note, the outstanding debt to Respondent Shankar Khandelwal was Rs. 5,16,55,842/-. This implies that earlier outstanding balances as claimed by the Respondent Shankar Khandelwal have been paid as per instructions of the Respondent Shankar Khandelwal and now at this stage, such plea of the Respondent for payment to other entity and not to him, can not be accepted. Thus, we hold that crystallised final outstanding debt by the Corporate Debtor to Respondent Shankar Khandelwal was Rs. 5,16,55,842/- and not other inflated outstanding claims as made out during averments by the Respondent Shankar Khandelwal.

48. Here, we will also like to refer to Ledger Accounts of the Corporate Debtor A. Gangwal Real Estate LLP with reference to accounts of Respondent Shankar Khandelwal. The relevant Ledger Accounts are reproduced for ready reference as under :-



49. The Respondent Shankar Khandelwal has pleaded not to take into account the Ledger Accounts; although with rider he has acknowledged the Balance Sheet while accepting outstanding Rs. 5,16,55,842/- as financial debt owed by Corporate Debtor to him. Hence, let us examine relationship between the Balance Sheet accepted by the Respondent Shankar Khandelwal and Ledger Account refuted by the Respondent Shankar Khandelwal in order to examine point raised by the Respondent Shankar

Khandelwal. On the one hand, balance sheet is the financial statement that summarizes company's financial position on the specified date giving a snapshot of a company's assets and liabilities and provide stakeholders clear picture of the company's financial health. The ledgers on the other hand, are books or records that contain complete records of all financial transactions of Company and therefore ledgers are used to track individual transactions. The balance sheet and ledger are both essential financial statements, the Balance Sheet is summary of a company's financial position while the ledger contains a detailed record of all financial transaction based on which the Balance sheet is prepared. Thus, we consider that since Ledger accounts are details of all transactions based on which the Balance Sheet has been prepared, the same ledger need to be looked into especially in such cases where dispute are raised about existence or settlement of the Financial Debt based on the balance sheet.

50. We have already noted that the Respondent Shankar Khandelwal filed an application under Section 7 of Code alleging non-payment of financial debt of Rs. 38,73,94,501/- which has been disputed by the Appellant stating this to be highly inflated amount due from the Corporate Debtor whereas the only Rs. 5,16,55,842/- was due and payable to the Respondent Shankar Khandelwal by the Corporate Debtor at the time of his retirement from the LLP. We note the averments of the Corporate Debtor relying on record to demonstrated the amounts paid to the Respondent Shankar Khandelwal and its sister concerns including Rs. 30 Crores to Guman Builder and Developer Private Limited. The Respondent Shankar Khandelwal

has also admitted that a sum of Rs. 30,00,00,000/- out of his alleged outstanding financial debt, was paid to his sister concern company Guman Builder and Developer Private Limited which depicts that the payment was made to the Respondent Shankar Khandelwal Financial Creditor. The clause 5 (vi) of the LLP agreement dated 31.12.2015, factors into payment to tother entity as mentioned therein and Guman Builder and Developer Private Limited is one of them. The net result of the transactions in the Ledger shows

Rs. 4,12,72,252/-, remained outstanding which was paid to the Respondent Shankar Khandelwal by the Corporate Debtor on 28.10.2016 by way of two drafts bearing nos. 725194 and 725195 amounts to Rs. 4,12,72,252 and Rs. 25,000/- respectively, towards the full and final discharge of its liabilities. The purported date of default, 17.04.2017, has been taken on account of a

First Information Report (FIR) which the Respondent Shankar Khandelwal failed to place on record with Application under Section 7 of the Code and filed it subsequently only with his additional affidavit on 20.07.2021.

51. In this context, we also note from the averments of the Respondent Shankar that (a) Bank Statement cannot be valid proof for discharge of its debt and (b) payment to third independent entity cannot be regarded as valid discharge of debts. As regards the first argument of the Respondent, we consider that bank payment, primarily, is valid proof, of course, which need to be co-related with other relevant information as and if needed. As regard, Second issue raised by the Respondent Shankar Khandelwal about payment to third Independent entity, generally speaking, the transactions are required to be made inter-se between concerned parties. If the loan has been given by the Financial Creditor to the Corporate Debtor, the repayment can be made by the Corporate Debtor only to the Financial Creditor. However, if Financial Creditor desires and make agreement to settle his outstanding dues by making payments to someone else specified by him, in

commercial world this need to be reckoned with towards satisfaction of outstanding debt of the Financial Creditor. Here, we take cognizance of fact that LLP Agreement dated 31.12.2015 was signed by the Respondent Shankar Khandelwal and Respondent Shankar Khandelwal as Financial Creditor signed specific Clause No. 5 (vi) i.e., "The parties here will prepare the Balanced Sheet of the said LLP prior to the retirement of the outgoing partner, being relevant for the retirement and reflecting all assets and liabilities of the LLP and will determine the amounts payable to the Outgoing Partner. In determining the amount payable to outgoing partner, the balances if any, with the name of Guman Builders & Developers Pvt. Ltd. or any of his Sister Concern shall be adjusted to be account of Outgoing Partner." This clearly implies that it was conscious and deliberate decisions of parties especially of the Respondent Shankar Khandelwal to make payment to Guman Builders and Developers Pvt. Ltd and Guman Furniture & Services Pvt. Ltd. After written LLP Agreement under which the Respondent Shankar Khandelwal resigned from the Corporate Debtor, now the issue raised by Respondent Shankar Khandelwal, therefore, is not tenable and cannot be accepted.

52. The bank statements of the Corporate Debtor are clear evidence of repayment of the amount due to the Respondent Shankar Khandelwal and the LLP Agreement dated 31.12.2015 described procedures to set off outstanding amount on the behalf of Respondent Shankar Khandelwal through named entity for the said repayment. The total amount due to the Respondent Shankar Khandelwal was Rs. 5,16,55,842/- which has completely been repaid firstly to the tune of Rs. 1,03,58,590/- which has been repaid in tranches between 01.04.2016 to 16.08.2016 and the same has been reflected through the Ledgers and bank account statements of the Corporate Debtor Rs. 4,12,72, 252/- has been repaid by way of Demand Draft No. 725194 dated 28.10.2016 and Rs. 25,000/- has been repaid vide Demand Draft No. 725195 dated 28.10.2016. Thus, we tend to accept the pleadings of the Appellant that based on combined examination

of Ledger and balance sheet it is proven that all dues towards the Respondent Shankar Khandelwal stand settled.

53. We also note the allegations of the Appellants that the Respondent Shankar Khandelwal is allegedly attempting to recover tainted money from Corporate Debtor, which is forming a part of the proceeds of crime. Even if the alleged loan is found to not be a part of the proceeds of crime, any attempts towards recovery of the amount would have to be adjudicated by a

civil court under a recovery suit. The intent of IBC is not to facilitate recovery for creditors. We tend to agree that once all outstanding dues have been paid by the Corporate Debtor to the Respondent Shankar Khandelwal, disputed claims if any, can be raised in suitable other legal forum and IBC can not be used for such recovery proceeding. In this connection, we note the judgment of the Hon'ble Supreme Court in Swiss Ribbons (P) Ltd. v. Union of India, [(2019) 4 SCC 17] [Page 39, Paragraph 28] states:

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes."

(Emphasis Supplied)

54. We also note that payment made vide two demand draft are undisputed which can be seen from the following :-



55. Now we would like to take into account the relevant portion of the Impugned Order which reads :-

“8. It is the case of the respondent-corporate debtor that as per its balance sheet of the Financial Year 2015-16 the balance due and payable to the applicant was only ₹5,16,55,842/-. It is the further case of the respondent-corporate debtor that the same was repaid to M/s Guman Builders and Developers Private Limited wherein the petitioner and his wife are the shareholders and thereby there is no debt due and payable as on date by the corporate debtor to the petitioner. On the other hand, it is the case of the petitioner that the claimed amount was given as a loan by him in his individual capacity to the respondent-corporate debtor and even as per the respondent-corporate debtor itself an amount of ₹5, 16,55,842/- was due and payable by it to the petitioner, in his personal capacity and that the respondent-corporate debtor failed to show any proof of payment of the said amount to him even after permitting him to file an additional affidavit along with the proofs, if any. Even according to the respondent-corporate debtor the amount of ₹30 crores has been paid only to M/s Guman Builders and Developers Private Limited, but not to the petitioner. He further submits that if any amount paid to any company or to any individual other than the petitioner cannot be treated as the due discharge of the debt payable to the petitioner.

9. We find force in the submissions made on behalf of the petitioner, since the respondent-corporate debtor failed to

show any valid proof that the debt due and payable to the petitioner in his individual capacity is paid to him in his individual capacity."

(Emphasis Supplied)

56. Thus, the main basis contained in the Impugned Order for admission of the Application under Section 7 of the Code is that the Corporate Debtor failed to show any valid proof that debt due and payment to the Respondent Shankar Khandelwal was paid in his individual capacity. In this regard, we have already examined in details that in normal circumstances the payment

is to be made to the party from whom money was taken, however, the significant point in present appeal is to note about specific written instruction/ advise/ agreement, whereby the Lender (the Respondent Shankar Khandelwal) asked borrower (the Corporate Debtor) to pay to third party (M/s Guman Builders and Developers Private Limited) as settlement of such dues. In term Clause 5(vi) of LLP Agreement dated 31.12.2015, all payments were settled as discussed in detail in pre-paras. The same has not been properly appraised in the Impugned Order and therefore the Impugned Order is not considered valid.

57. No amount of financial debt was due to the Respondent Shankar Khandelwal on the date of filing of the Application under Section 7 of the Code before the Adjudicating Authority. Therefore, the Adjudicating Authority has patently erred in admitting the Application filed by the Respondent Shankar Khandelwal vide its Impugned Order dated 13.10.2021.

58. Based on above discussion, we hold that the Adjudicating Authority erred in passing the Impugned Order dated 13.10.2021 admitting application under Section 7 of the Code and therefore Impugned Order deserves to be set aside accordingly.

59. In fine, the Appeals succeed and the Impugned Order is set aside. No Costs. Interlocutory Application(s), if any, are Closed.